

to immediately proceed to implement an allocation program including the Mandatory Crude Oil Allocation Program which Gulf challenges.

In view of the fact that the Congress itself recognized the existence of emergency economic conditions which required immediate action and in fact directed that those actions be taken without delay, the Congress certainly intended the FEA to formulate a crude oil allocation program without the elaborate formal procedures for determination of environmental impact, if any, which the NEPA requires. *Gulf Oil Corp. v. Simon*, CCH Fed. Energy Guidelines, Par. 26,002(2) (TECA) (July 29, 1974). Cf. *Dry Mfrs. Assn., Inc. v. Dept. of Labor*, 486 F. 2d 98, 107-08 (3rd Cir. 1973).

Based on the considerations set forth above and the submission made by Gulf, the FEA has determined that Gulf Oil Corporation has failed to demonstrate that the directive issued to it as set forth in the June 18, 1974 Refiners Buy-Sell List is erroneous in fact or in law or is arbitrary or capricious.

It is therefore ordered that:

(1) The appeal filed by Gulf Oil Corporation from the directive issued to it as set forth in the June 18, 1974 Refiners Buy-Sell List be and hereby is denied.

(2) This is a final order of the Federal Energy Administration of which any aggrieved party may seek judicial review.

¶ 20,216

Reinauer Petroleum Company, Hackensack, New Jersey (Case No. FEA-0306, Filed 12-2-74, Decided 12-23-74).

Freedom of information.—Reinauer Petroleum Company appealed from a Denial of Request for Information issued to it by the Federal Energy Administration on November 14, 1974. Reinauer Petroleum Company had requested copies of all documents submitted by Reinauer Brothers Oil Company in support of the latter's appeal of a Decision and Order issued by the FEA to Reinauer Petroleum Company on March 21, 1974. In considering Reinauer Petroleum Company's appeal, the FEA found that: the documents requested by Reinauer Petroleum Company contain confidential commercial and financial information which is exempt from disclosure under 5 U. S. C. 552(b)(4) and that disclosure of the requested documents would not be in the public interest since they contain sensitive commercial information. The FEA therefore concluded that Reinauer Petroleum Company failed to demonstrate that the Denial of Request for Information issued to it on November 14, 1974, was erroneous in fact or law, and denied the appeal.

Decision and Order

On December 2, 1974, Reinauer Petroleum Company (Reinauer-Hackensack) filed an Appeal from an order issued by the Federal Energy Administration denying a Request for Information which the firm had filed. The Request for Information was submitted pursuant to Section 202.3 of the FEA's

regulations relating to disclosure of information. Those regulations, contained in 10 CFR, Part 202, specify the procedures to be followed in requesting the FEA to disclose information which is not available in a public reference facility and which is not otherwise customarily made available by the agency. Reinauer-Hackensack's appeal was submitted

pursuant to Section 202.6 of those regulations.

In the Request for Information Reinauer-Hackensack requested that the FEA release to it copies of all documents which Reinauer Brothers Oil Company (Reinauer-Mahwah) had submitted to the FEA in connection with the appeal of a Decision and Order issued by the FEA to Reinauer-Hackensack on March 20, 1974. On November 14, 1974, the FEA denied Reinauer-Hackensack's Request for Information, concluding that Reinauer-Hackensack had already been furnished a portion of the material involved and that the remaining portions of the documents which it requested contained confidential financial and commercial information whose release would be prejudicial to Reinauer-Mahwah. In the order to Reinauer-Hackensack the FEA concluded that the documents not previously furnished to it were exempt from disclosure under Section 552(b)(4) of the Freedom of Information Act.

In its appeal of the FEA's denial of its Request for Information Reinauer-Hackensack asserts that since the FEA permitted Reinauer-Mahwah to examine financial data submitted by Reinauer-Hackensack, it is necessarily obligated to permit Reinauer-Hackensack to examine financial data submitted to it by Reinauer-Mahwah.

In view of the record in this matter, Reinauer-Hackensack's contention is without merit. On June 3, 1974, the FEA contacted Reinauer-Hackensack to determine which portion, if any, of its submissions to the FEA it wished to be withheld from public disclosure. Reinauer-Hackensack responded that none of its submissions was confidential and stated that it had no objections to public disclosure of all material which it submitted. The telephone conversation in which this statement was made was confirmed in a letter from the FEA to Reinauer-Hackensack dated June 5, 1974. No conditions were placed upon the release of data and, as a result, the FEA, acting upon a request from Reinauer-Mahwah for production of that data, released it to Reinauer-Mahwah. Subsequent to the public release of the

documents, the FEA received a letter from Reinauer-Hackensack which purported to condition its previous statement that no part of its submission was confidential upon the similar release of all data which any other party might submit. However, that condition was not effective since it was not made in a timely manner and in fact was asserted only after the FEA, relying upon its previous statement, had released the data which Reinauer-Hackensack had submitted.

On the other hand, when Reinauer-Mahwah was asked by the FEA which parts of its submissions were confidential it immediately asserted that all financial data relating to specific costs, sales and profitability was proprietary and not subject to public release. As a result the issue presented in this appeal is whether Reinauer-Mahwah's assertion of confidentiality is correct or whether the Freedom of Information Act requires the production of the data which Reinauer-Mahwah has consistently claimed is confidential and not subject to public release.

The provisions of 5 U. S. C. 552, known as the Freedom of Information Act, were implemented by the FEA in Subpart A of Part 202 of the Mandatory Petroleum Allocation and Price Regulations. Although the primary purpose of the Freedom of Information Act is to encourage disclosure of information held by the government to private citizens upon their request, Congress recognized that certain categories of information must be exempt. In this connection, Section 552(b) lists nine specific exemptions from the disclosure requirements of the Act. (An identical list may be found at 10 CFR 202.9(a).) The fourth exemption, which FEA relied upon in denying Reinauer-Hackensack's Request for Information, applies to matters which are:

Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

The information requested by Reinauer-Hackensack consists of highly sensitive financial and commercial information submitted to the FEA by Reinauer-Mahwah in support of its appeal, in-

cluding Reinauer-Mahwah's balance sheets and income statements over a five-year period, its sources of income, its costs, markups, prices, profits and financial projections for the current fiscal year. Such information is "confidential" as that term has been defined in court opinions and in the FEA's decision in *Kocolene Oil Corporation*, CCH. Fed. Energy Guidelines, Par. 20,199 (December 2, 1974). In *Kocolene* the FEA determined that "the controlling test . . . is whether the documents requested could be fairly characterized as the type of information that would not generally be made available for public perusal." *Kocolene Oil Corporation*, *supra*. The information requested by Reinauer-Hackensack in this case is clearly of such a "confidential" character. It consists of detailed information regarding Reinauer-Mahwah's entire operations, of the type which a privately-held business enterprise does not generally disclose.

In addition, as stated above Reinauer-Mahwah specifically requested, unlike Reinauer-Hackensack, that the information be kept confidential, since it was not the type of information which Reinauer-Mahwah wished to release to the public. A claim of confidentiality by the person submitting information to the government is entitled to some weight in determining whether the information should be withheld from disclosure. *Bristol-Myers Company v. Federal Trade Commission*, 424 F. 2d 935, at 938 (C. A. D. C. 1970); *National Parks and Conservation Association v. Morton*, 498 F. 2d 765, at 767 (C. A. D. C. 1974).

Furthermore, the United States Court of Appeals of the District of Columbia Circuit has stated that the fourth exemption to the disclosure requirements of 5 U. S. C. 552 "may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position. *National Parks and Conservation Association v. Morton*, *supra*. 498 F. 2d at 770. The information requested in this case is of this nature. Disclosure of a company's sources of income, its costs,

markups, prices and profits, and its financial projections for the current fiscal year expose the relative strengths and weaknesses of the company's operations and competitive position. Such information, in the hands of a competitor, could be used to the detriment of the company submitting the information. As a result, the FEA properly classified the information as exempt from disclosure pursuant to 5 U. S. C. 552(b)(4).

However, the FEA regulations require the release of data submitted to it even though the information is exempt from disclosure under 5 U. S. C. 552 unless the FEA determines that disclosure is not in the public interest. [10 CFR 202.1] Reinauer-Hackensack asserts the confidential material submitted to the FEA by Reinauer-Mahwah was presented in an appellate proceeding before the FEA in which Reinauer-Hackensack was adversely affected and that such information should have been made available to Reinauer-Hackensack so that it could have determined whether the information was deceptive, inaccurate or false. However, in a letter sent to Reinauer-Hackensack on June 5, 1974, the FEA officially notified the firm of Reinauer-Mahwah's appeal and of Reinauer-Hackensack's right, as a party that might be adversely affected, to submit comments regarding the case. Included in that letter were copies of all submissions made by Reinauer-Mahwah to the FEA, with confidential commercial or financial information deleted. Reinauer-Hackensack was given an opportunity to submit whatever information it deemed relevant to the FEA's determination of Reinauer-Mahwah's appeal. Extensive comments were, in fact, received by the FEA on June 24, 1974 from Reinauer-Hackensack with respect to the appeal filed by Reinauer-Mahwah.

Reinauer-Hackensack also asserts that the requested information should be released to it on the grounds that the information would be of assistance to it in its current litigation with Reinauer-Mahwah. As discussed above, the requested information consists of highly sensitive material, the disclosure of

which could subject Reinauer-Mahwah to serious competitive harm. Furthermore, Reinauer-Hackensack could, in its present court action, obtain a protective order from the court which would permit Reinauer-Hackensack to inspect this material while preserving Reinauer-Mahwah's right to keep such information confidential from the public. This approach would avoid the possibility of competitive injury to Reinauer-Mahwah by the release of the information in a manner not possible in an FEA proceeding. The public interest would best be served by the FEA's decision not to release this information to the public at the present time.

Finally, it should be noted that the disclosure of the information requested by Reinauer-Hackensack could well violate 18 U. S. C. Section 1905, which subjects to criminal sanctions any Federal officer or employee who discloses any information which concerns or relates to "the trade secrets, processes, operations, style of work, or apparatus,

or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association" to any extent not authorized by law.

Based on the considerations set forth above and the submission made by Reinauer-Hackensack in support of its appeal, the Federal Energy Administration has concluded that Reinauer-Hackensack has failed to establish that the Denial of Request for Information issued to it on November 14, 1974 is erroneous in fact or law.

It Is Therefore Ordered That:

(1) The appeal filed by the Reinauer Petroleum Company from the Denial of Request for Information issued to it on November 14, 1974, be and hereby is denied.

(2) This is a final order of the Federal Energy Administration of which the appellant and any aggrieved party may seek judicial review.

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Union Oil Company of California, Los Angeles, California (Case No. FEA-0206, Filed 8-21-74, Decided 12-23-74).

Crude oil.—Union Oil Company of California (Union) filed an appeal from a Decision and Order issued to it by the FEA which denied the firm's application for an exception from the provisions of the FEA Mandatory Crude Oil Allocation Program. In denying the appeal the FEA reaffirmed its original determinations that (i) the standard specified in the FEA Crude Oil Allocation Regulations for calculating the sales obligations of refiner-sellers was lawful; (ii) Union could meet its sales obligations under the Crude Oil Allocation Program without significantly affecting the level of crude runs at its own refineries; (iii) certain independent refiners were properly classified as a refiner-buyers under the program; and (iv) Union's sales obligations were not grossly inequitable compared to those of other refiner-sellers. Additionally, the FEA found that Union has in fact been able to recover all increased costs which it had experienced as a result of its sales obligations during the June-August allocation quarter.

Decision and Order

[The original of this document contains information which is arguably confidential

under 18 U. S. C. 1905. Such material has been deleted from this copy and is replaced with x's.]